No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

STATEMENT OF THE CASE.

Introduction.

Appellants Lee and Victor Herman have appealed from a judgment entered on a verdict in favor of respondent insurance carrier [Tr. p. 61].[1] The action involved a claimed theft or loss of a $35,000 diamond ring. At the trial the court admitted testimony of Mr. Kenneth Scarce, a polygraph examiner, who testified that he received his training in the Los Angeles Police Department and is employed as a polygraph examiner by the District Attorney's office of Los Angeles County [R. Tr. p. 321], and that he teaches the subject at the Gormac School in Pasadena, California [R. Tr.

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[1]Tr. refers to transcript of record; R. Tr. refers to reporter's transcript.

p. 322, lines 10-18].[2] He has taken in excess of 1500 polygraphs [R. Tr. p. 322, line 25, to p. 323, line 3].

Based upon his polygraph examination of plaintiff appellant Lee Herman, Mr. Scarce testified that Mrs. Herman

> "* * * was untruthful to the statement that she made concerning the missing ring * * * that she knew the person that had taken the ring, that she had seen him and talked to him since I had given the polygraph examination to Mr. Herman, and that this was—it was a false report." [R. Tr. p. 332, line 25, to p. 333, line 7].

Mr. Scarce further testified that the test indicated that Mrs. Herman testified untruthfully to the question as to whether she had seen the ring since it was reported missing [R. Tr. p. 344, line 1, to p. 345, line 4].

Appellants moved for a new trial claiming that the admission of evidence respecting the polygraph examination was error [Tr. pp. 144-166]. This motion was denied by Judge E. Avery Crary, in accordance with his Memorandum Opinion [Tr. pp. 92-107].

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[2]Mr. Russ Jones, a polygraph examiner called by appellants indicated the Gormac School is the only one recognized in this area [R. Tr. p. 505, lines 3-6].

ARGUMENT.

Factual Background.

Although appellants appear to raise but one question in their brief (admissibility of polygraph evidence) they have claimed in their brief that there was no other "evidence of any impropriety in the claim" (Appellants' Br. p. 29). Respondents contend to the contrary that the evidence at trial, even absent the polygraph testimony would amply justify the jury's verdict.

Evidence Showing Motive to Make False Claim.

The ring in question was insured for and valued at $35,000 [Tr. p. 27, lines 11-14]. Thus, had there been an obligation under the respondents' insurance policies, the amount of the companies' liability was fixed in that amount (California Insurance Code, Sec. 412).

The evidence presented at court respecting the acqisition of the ring allegedly missing was in striking contrast with that ordinarily to be expected in a regular business transaction, and might be best described as bizarre. Appellants called Fred Braun, a jeweler, who testified that he had appraised the ring at $35,000 [R. Tr. p. 130, lines 3-11; p. 133, lines 9-23]. Mr. Braun admitted that he told the insurance adjuster Reece that the sales price by him to Mrs. Herman was "About thirty-four, 35,000. Thirty-four", but admitted that this statement was erroneous [R. Tr. p. 151, lines 9-16]. His testimony respecting the sales price, absent

the admission mentioned above, was that he sold Mrs. Herman the ring in 1963 for a total of $26,800, of which $25,000 was paid in cash and he took a "trade-in ring" for $1800 [R. Tr. p. 134, lines 3-15].

Although Mr. Braun generally keeps records showing purchases and sales, no ledger entry was made regarding this particular transaction [R. Tr. p. 140, line 21, to p. 141, line 11]. Mr. Braun was required to pay federal excise tax on such sales, but did not do so at the time, but did later [R. Tr. p. 141, lines 12-21]. He testified that the ring was mailed to him from New York, and he paid $22,000 in cash for it [R. Tr. p. 142, lines 9-19]. Braun further testified that in payment for the ring he mailed cash to New York in $100 bills, and got no receipt for the payment [R. Tr. p. 143, line 16, to p. 144, line 25], although most of his jewelry purchases are by check [R. Tr. p. 145, lines 4-6]. Mr. Braun gave the Hermans no invoice respecting the ring [R. Tr. p. 148, line 25, to p. 149, line 2].

Mrs. Herman testified respecting the purchase of the ring that she paid no checks at all to Mr. Braun [R. Tr. p. 213, lines 2-5], but rather, she wrote checks to cash, cashed them and then took the cash over to Braun [R. Tr. p. 213, lines 11-13]. She later testified that she had written a total of $11,000 of checks to cash and got the rest of the cash from her safe deposit box [R. Tr. p. 215, lines 5-10].

The absence of records, and the seeming conspiracy to prevent the existence of records regarding a transaction supposedly involving $26,800 would appear to raise a serious question as to the existence and value of the ring, and as to whether it was really a valuable diamond at all. The discrepancy between the alleged

purchase price of $26,800 and the amount for which the selling jeweler then purportedly valued the ring at $35,000 upon which appraisal the insurance companies based their valued policies, would appear to create the opportunity for a quick profit of $8,200 in the event of a loss payable by the insurers.

Circumstances of Alleged Theft.

Mrs. Lee Herman testified that about five years ago a previous theft of jewelry had occurred and she settled with her insurance company at that time for $1500. Between that time and the claimed loss involved here, she acquired approximately $100,000 worth of jewelry [R. Tr. p. 205, lines 8-24]. The alleged theft or disappearance of the ring involved occurred on September 23, 1964, a Wednesday. According to Mrs. Herman's testimony, she went to her box which contained her jewelry, including the ten-carat diamond ring involved in this loss, on the morning of that day and testified "So I wanted to wear some green jewelry, so I went to the box, and to my best recollection my ring was lying right here" [R. Tr. p. 194, lines 13-15]. At that time, according to Mrs. Herman, there was also present in this particular jewelry box earrings worth about $2,000, a diamond pin worth about $4,000, two diamond bracelets worth approximately $10,000, an emerald diamond ring worth approximately $2,000, a gold bracelet with emeralds and diamonds worth about $4,000, and other various gems [R. Tr. p. 206, line 12, to p. 207, line 16]. Mrs. Herman further elaborated, testifying

> "* * * so to my best recollection now I pulled this little ring out from under here, and I thought that this—my large ring turned over, so I was so sure that ring was in that box." [R. Tr. p. 195, lines 1-4].

On cross-examination Mrs. Herman modified this testimony a bit, stating "I am not going to say I am positive I saw it, but I can just see a vision, and I just think I saw it there" [R. Tr. p. 218, lines 7-8]. However adjuster Miles Reece testified that Mrs. Herman told him

> "* * * that she had definitely seen the ring at 8:30 or 8:45 * * * and this particular wedding ring was in the jewelry box together with the ten-carat diamond ring but underneath the ten-carat ring, so that when she reached into the box and withdrew the wedding band, the ten-carat ring * * * the ring tipped over * * *" [R. Tr. p. 291, lines 8-15].

Mrs. Victoria Sneezer, the Herman maid, testified that she put the ring in the jewelry box Tuesday evening, the night before the alleged disappearance [R. Tr. p. 46, lines 5-11]. She had intended to take it to jeweler Braun and went to get it at about 11 o'clock [R. Tr. p. 59, lines 5-16]. She testified that at that time the ring in question was not there, but all the other jewelry was [R. Tr. p. 69, lines 5-10]. Mrs. Sneezer then called Mrs. Herman by telephone and told her that the ring was not in the box. According to Mrs. Sneezer, Mrs. Herman said "Vicki, look. I saw the ring this morning. It is in the box. It is there." [R. Tr. p. 69, lines 15-16]. Mrs. Sneezer testified that she then took the other jewelry which she was supposed to deliver to jeweler Braun and drover to Mrs. Herman's office, saying to her "Mrs. Herman, the ring isn't there" [R. Tr. p. 69, line 19, to p. 70, line 3]. She testified that Mrs. Herman then said "Vickie it is there, go back and look again but take the jewelry to

Mr. Braun" [R. Tr. p. 70, lines 4-5]. Mrs. Sneezer later testified "* * * she told me, 'Vicki, go back and look,' and she said, 'Call me when you find it.' " [R. Tr. p. 71, lines 21-22]. Upon this subject Mrs. Herman testified that she told Vicki while at the office "* * * look through that box again and let me know if you don't find it" [Rr. Tr. p. 196, lines 1-2]. Mrs. Herman then testified "Well, she hadn't called me all day, so I had no reason to wonder. I thought about it during the day, but she hadn't called, so I felt very—" [R. Tr. p. 196, lines 3-5].

According to Mrs. Herman there was no sign of forcible entry to the house [R. Tr. p. 198, lines 17-19]. She likewise advised adjuster Reece that all doors and windows were locked and that there was no evidence of anyone having entered the home [R. Tr. p. 287, lines 16-17].

According to adjuster Miles Reece, Mrs. Sneezer (the Herman maid), stated that it was almost a phobia with the Hermans to keep all doors and windows locked due to a previous burglary [R. Tr. p. 287, lines 9-13]. At trial, however, Mrs. Sneezer indicated that one of the doors had not been locked and that she had first stated that in the office of attorney Katz [R. Tr. p. 94, line 17, to p. 95, line 4]. At trial she also denied having told anybody that the door was kept tightly locked [R. Tr. p. 95, lines 3-5]. Officer Richard F. Haas interviewed Mrs. Sneezer following the initial investigation. Mrs. Sneezer told him that it was her duty to lock the doors for the night but said nothing about taking any trash out [R. Tr. p. 318, line 5, to p. 319, line 3], and told him nothing about how anyone could have gotten into the house [R. Tr. p. 415, lines 7-9]. Mrs.

Herman likewise told Officer Haas according to the officer's testimony that "she didn't know how anyone could have gotten in the house" [R. Tr. p. 415, line 17].

In her pre-trial deposition Mrs. Herman testified as follows:

> "Q. Had you at any time before this ring was discovered to be missing told your husband in substance or effect that if his attitude continued, that desperate steps would have to be taken? A. His attitude about what?
>
> Q. About anything. A. No, sir.
>
> Q. Had you told Vicki to tell your husband anything of that sort? A. Never." [R Tr. p. 226, lines 3-12].

Mrs. Sneezer testifed that on the morning when the alleged theft occurred Mrs. Herman left home before Mr. Herman did but before doing so, she wrote down a note to convey to Mr. Herman on instructions from Mrs. Herman [R. Tr. p. 96, line 2, to p. 97, line 5]. The note [Ex. A] was read into the record by Mrs. Sneezer as follows:

> "Mr. Herman, Mrs. Herman told me to tell you she don't like the idea what you said about her—about she don't know what she is doing—what she is doing in the office, and she don't know any—no note you say about her that she don't know anything in the office. She don't know anything what makes her unhappy, really it is time you understood I have been in this business for 18 years. Everyone think I am the greatest. Everyone think I am the greatest, and everyone think I am the greatest in the world but you. If you don't

understood about me, steps—if you don't understand about me, steps will have to be taken because my doctor tells me I am to get—I am not to get nervous any more." [R. Tr. p. 99, lines 11-25].

At trial Mrs. Herman admitted leaving a message with Vicki and stated it was not her custom to do so and that that was the first time she had done so [R. Tr. p. 224, lines 22, 23].

It is not impossible of course that a thief might have picked one ring from a collection of valuable jewels and left the others. The jury as trier of fact, was, however, entitled to entertain certain doubts on the subject.

Polygraph Evidence Was Properly Admitted.

On the record presented, the trial court admitted that the testimony of Kenneth Scarce concerning the polygraph examination conducted by him, and the results thereof. Appellants, in their motion for new trial, relied upon this circumstance. In denying appellants' motion for new trial, the Honorable E. Avery Crary, United States District Judge, prepared a Memorandum Opinion in which the circumstances leading up to the admission of this testimony and the reasons for its admission are thoroughly discussed. A copy of this Memorandum Opinion is appended hereto as "Appendix A". Appellees respectfully request that his Honorable Court consider Judge Crary's Memorandum Opinion as constituting a part of this brief, and the following discussion as being supplementary thereto.

The polygraph examination was taken on April 22, 1965 pursuant to a document signed by plaintiff Lee

Herman and by the attorney representing the appellee insurance companies, which document recites, in part:

> "The Hermans and the Companies do mutually agree that the lie-detector examiner, Mr. Kenneth Scarce, may testify respecting his examination and respecting his opinions based upon said examination in any Court of competent jurisdiction." [Tr. p. 73].

Mr. Arnold Shane, the attorney representing Mr. and Mrs. Herman at the time and place of the taking of the polygraph examination, added the following words to the agreement:

> "Subject to cross-examination by plaintiff." [Tr. p. 73; R. Tr. p. 419, line 20, to p. 420, line 12].

Prior to admitting the polygraph testimony, the trial court permitted testimony regarding the circumstances of the signing of Exhibit C [Tr. p. 73] outside of the presence of the jury. The record will show that only two witnesses testified on this subject, they being Mrs. Herman and Mr. Scarce. Mrs. Herman denied that she signed Exhibit C [Tr. p. 73] on November 11, at the time her polygraph examination was taken [R. Tr. p. 273, line 24, to p. 274, line 6]. Mr. Scarce testified respecting the signing of Exhibit C by Mrs. Herman, that her attorney, whom he believed was a Mr. Shane, said either

> "* * * it is okay for her to sign, it is all right for her to sign or 'I have no objection for her to sign,' I am not sure of the wording * * *" [R. Tr. p. 261, lines 6-12].

Appellants place great reliance in their brief on affidavits concerning this subject. The affiants, how-

ever, were not subject to cross-examination on their subject matter, nor were the affidavits offered or received in evidence. On this subject, the transcript shows as follows:

> "Mr. White: * * * However, I would like to object to the introduction of this affidavit.
>
> The Court: It is not going to be introduced. There has been no offering of the affidavit as far as evidence goes.
>
> Mr. Soll: No." [R. Tr. p. 257, lines 19-25].

The Court, on the evidence presented, was of the opinion that Mrs. Herman did sign the agreement on April 22, 1965 [R. Tr. p. 96, lines 3-5].

On consideration of the appellants' motion for new trial, the court had before it, not only the moving papers, but likewise, points and authorities in opposition and the affidavit of James O. White, attorney for appellees [Tr. pp. 86-88]. It appears clear, from the remarks from Judge Crary in his Memorandum Opinion that he accepted the evidence and the affidavits, indicating that Mrs. Herman did sign the agreement *re* taking polygraph with the concurrence of her attorney, who was then present and raised no objection to the agreement as amended by himself and signed by his client with his acquiescence.

In *Court of Commissioners v. Younger,* 29 Cal. 147, 149, the court states regarding stipulations:

> "While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the Court *unless the same is signed or assented to by such attorney.*" (Emphasis added).

The same language occurs in *Crescent Canal Co. v. Montgomery,* 124 Cal. 134, 56 Pac. 797, 802, and is likewise quoted in *Boca & L. R. Co. v. Superior Court,* 150 Cal. 153, 88 Pac. 718, 719. The rule is stated in 46 Cal. Jur. 2d page 3, Stipulations, Section 3, as follows:

> "If a party has an attorney of record, a stipulation relating to the conduct or disposal of an action is ineffectual *unless signed or assented to by the attorney.*" (Emphasis added).

Irrespect of whether Mrs. Herman signed the agreement respecting polygraph [Ex. C; Tr. p. 73] on April 22, 1965 or on a prior date, the record is without contradiction that she was represented by counsel at the time of the taking of the polygraph examination, her counsel knew of the circumstances under which it was taken, was familiar with the stipulation and had indeed added an amendment permitting cross-examination of the polygraph examiner, and that the entire proceeding had the approval of appellees' attorney of record.

As stated in *People v. Rogers,* 207 Cal. App. 2d 254, 24 Cal. Rptr. 324, 328:

> "But evidence otherwise incompetent as proof of the existence of a particular fact may be received for that purpose where a defendant stipulates thereto."

In *McBain v. Santa Clara Savings & Loan Association,* 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (hearing denied), the court considered the effect of a stipulation which was entered into by two of the parties' attorneys, with the attorney for the third party being present but silent regarding the stipulation. The court held that

the stipulation was binding on the silent party, commenting:

> "However, assent to a stipulation need not be made in a formal manner and under the particular circumstances of a case, where a party's counsel remains silent and makes no objection to the stipulation, his passive acquiescence may constitute and assent ot it. (*Palmer v. City of Long Beach, supra;* 46 Cal. Jur. 2d pp. 23-24; *C. Wilson v. Mattei* (1927), 84 Cal. App. 567, 571, 258 P. 453.)" (51 Cal. Rptr. at p. 84).

The court further stated:

> "Under all the circumstances of the case, we are satisfied that the continued silence of Mr. Christy constituted an assent to the stipulation. Indeed, the present objection to the stipulation, seen in the perspective of the proceedings below, appears specious." (51 Cal. Rptr. at p. 85).

It is stated in *Federal Deposit Ins. Corporation v. Siraco,* 174 F. 2d 360, 362-363 (U.S.C.A. 2d):

> "A stipulation may broaden the issues raised by the pleadings or change the rules of evidence as to what may be shown by way of defense under a general denial. (Insurance Co. v. Harris, 97 U.S. 331, 336-337, 24 L.Ed. 959.)"

The only reported California case concerning the use of a polygraph examination after a stipulation, that the same might be used in evidence is *People v. Houser* (1948), 85 Cal. App. 2d 686, 193 P. 2d 937. There, as here, a party who did not like the results of the test appealed after it had been received in evidence, claiming that its admission was improper. The ruling of the

California District Court of Appeal, affirming the conviction in that case, has never been overruled, and appears to constitute the present law of the State of California.

People v. Houser was cited in support of the court's ruling in *People v. Reyes,* 206 Cal. App. 2d 337, 23 Cal. Rptr. 705, 709. In that case the defendants contended that the court erred in submitting the issue of probable cause to the jury. The court, in holding that such was not error under the circumstances, states:

> "However, in the instant case, each of the defendants requested that the issue be tried by the jury and cannot now complain that their request was granted."

Judge Roger Alton Pfaff of the Superior Court of Los Angeles County authored an article which appears in Volume 50 No. 12 (December, 1964) of the American Bar Association Journal. In the article Judge Pfaff discusses the fact that the polygraph has been used in civil cases in Los Angeles County, and cites the decisive role which the polygraph can play in paternity proceedings. Judge Pfaff, in said article, uses the following quote from Arthur and Caputo, Interrogation for Investigators 214 (1959):

> "The results of *properly administered* polygraph examinations are very accurate. The latest estimation, based upon a five-year study of those persons tested by the senior author, accords to his polygraph technique an accuracy of over 96 per cent with a 3 per cent margin of inconclusive (indefinite) determinations and a 1 per cent margin of maximum possible error. The actual

known error during this same period is less than .0005; that is one twentieth 1/20th of one per cent. It is interesting to note that these known errors involved reporting a guilty party to be innocent."

It is stated by Richardson, Modern Scientific Evidence (1961) that such evidence should be admitted with a stipulation. He states:

"The trend is definitely in that direction and possibly a majority of jurisdictions would admit this evidence under stipulation."

In Wigmore on Evidence (3rd Ed. 1940, Supp. 1962):

"Any other result would seem to be inconsistent with the general spirit and practice of our litigation, which judicially leaves to the parties the framing of their pleadings and issues and determines no objection not expressly waived by one of them. Moreover * * * the judicial refusal to recognize it [the stipulation] would often permit unseemly breaches of faith by counsel who have agreed to the admission." (at Sec. 2892).

In an article appearing in 50 A.B.A. Journal 470 (May, 1964) Inbau and Reid note that generally the lie detector technique has at most an approximate 5% error with perhaps another 5% to 10% of tests which are not subject to a conclusion as to the veracity of the person tested. All authorities appear to agree that the competency of the examiner is of great importance in obtaining accurate results.

The *Houser* case, *supra,* was cited by the Arizona court in *State v. Valdez,* 91 Ariz. 274, 371 P. 2d 897 (1962). In that case the defendant was charged with

illegal possession of narcotics. Both he and his attorney signed a stipulation to the effect that polygraph evidence would be permitted. The results of the test were unfavorable to the defendant and defendant's attorney objected to the introduction of the test as evidence. The court held that under the circumstances the test was admissible, and in doing so quoted from *People v. Houser, supra.*

The *Houser* case, *supra,* was also cited in the case of *State v. McNamara,* 252 Iowa 19, 104 N.W. 2d 568 (1960). That case involved a murder trial where the defendant was the only one to sign the stipulation regarding the admissibility of the results of a lie detector test. The court, in holding the results to be admissible states:

> "We hold the lie detector evidence admissible by reason of her [defendant] agreement."

Conclusion.

It was incumbent upon the plaintiff-appellees to sustain the burden of proof that a loss occurred within the terms and conditions of the policies of insurance issued by appellees. There was considerable evidence presented which raised a very serious question as to the *bona fides* of the claim. It was established that had there been a judgment in favor of plaintiffs, a considerable profit would have resulted by reason of the policies having been issued on a "valued" basis, based upon the questionable appraisal of jeweler Braun. The circumstances of the claimed loss, where the thief, if there was one, picked out one gem amongst a collection purportedly worth about $100,000.00, and left the remainder; where there was no evidence of forced entry

in a home which purportedly was extremely security-conscious; and where the jury had a right to, and undoubtedly did, conclude that there was serious impeachment of the witnesses called on behalf of plaintiff, the polygraph evidence was but another and additional part of the impeaching evidence admitted at trial.

Appellants' attorney not only agreed to the polygraph examination, but suggested that it be taken. The stipulation regarding the admissibility of the testimony of the polygraph examiner was amended by appellants' attorney who was present at the time of the examination which did not proceed until the amendment had been added. The polygraph examination was taken as a direct result of the stipulation. The present position of appellants, who undoubtedly would have been pleased to have the testimony had it been favorable to their position, would appear to be the type of situation remarked upon by Wigmore (*supra*) where he mentions "unseemly breaches of faith by counsel who have agreed to the admission".

Appellees respectfully urge that the Court properly admitted the results of the polygraph examination, that the case was fairly tried, and that the judgment based upon the verdict is a proper judgment under the facts and under the law.

Respectfully submitted,

CUMMINS, WHITE & BREIDENBACH,
By JAMES O. WHITE,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James O. White

APPENDIX A.

Memorandum Opinion and Order Denying Motion for New Trial.

United States District Court, Central District of California.

Lee Herman and Victor Herman, Plaintiffs, vs. Eagle Star Insurance Company, Ltd., a corporation; Centennial Insurance Company, a corporation; Niagara Fire Insurance Company, a corporation, Defendants. No. 65-191-EC.

Filed Sep. 28, 1966.

Plaintiffs move for a new trial for the several reasons noted in their motion but rely in chief on the grounds that the court erred "* * * in admitting the testimony of Kenneth Scarce concerning the administering by him and the taking by the plaintiff, Lee Herman, of a polygraph examination concerning the circumstances surrounding the mysterious disappearance of the diamond ring in question, together with the admitting into evidence of the chart of the polygraph examination, and admitting into evidence the interpretation by the witness, Kenneth Scarce, of the polygraph examination, and admitting into evidence the opinion of Kenneth Scarce concerning the results of the polygraph examination" (Page 1, line 28, to line 5, page 2, Motion for New Trial). Plaintiffs' points and authorities filed in support of their motion for new trial are devoted entirely to the matter of the polygraph evidence relating to plaintiff, Lee Herman, and plaintiffs urge that the polygraph and the testimony of Mr. Scarce were erroneously admitted, in that the stipulation therefor was not signed by plaintiffs' counsel and the right

to object to the evidence was reserved in the Pre-Trial Order.

The question of the admissibility of evidence in trials in the Federal court is governed by Rule 43, Federal Rules of Civil Procedure. Applying that rule to the instant case, all evidence should be admitted if admissible under a Federal statute or rules applied by courts of the United States in suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the State in which the United States Court is held.

The case of *People v. Houser* (Cal. 1948), 193 Pac. 2d 937, discussed hereinafter, concerns the question here involved, although some will argue that it is not clearly in point and for that reason cases in other jurisdictions are considered and discussed in this Memorandum Opinion with the purpose of determining what the rule in California would be in the factual situation found herein.

The general rule is well established in California and elsewhere that polygraph tests or testimony with respect thereto are not admissible in evidence. The New Jersey appellate court in *State vs. Arnwine* (1961), 67 New Jersey Super. 483, 495, said "* * * that there is not a single reported decision where an appellate court has permitted the introduction of the results of a polygraph or lie detector test as evidence in the absence of a sanctioning agreement or stipulation between the parties."

In the case at bar, Mrs. Herman (Lee Herman) signed an "Agreement re Polygraph Examination" (Defts.' Ex. C) which provided, in part, that the polygraph test be taken and that the "lie detector" ex-

aminer, Mr. Kenneth Scarce, might give all information re said test to the companies, and it was mutually agreed that Scarce "* * * testify respecting his examination and respecting his opinion based upon said examination in any court of competent jurisdiction subject to cross-examination by plaintiffs." It was further agreed that a transcript of the polygraph examination should constitute "* * * examinations under oath which are provided for in the policies of insurance issued by the companies * * *."

There is a controversy as to whether the agreement was signed by Lee Herman on November 11, 1964, when the polygraph test was given to Mr. Herman, her husband, at their home in Beverly Hills, or on April 22, 1965, when Mrs. Herman's test was made at their home. The original agreement, signed by Mr. Herman on November 11, 1964 (Defts.' Ex. D), contained the notation in the handwriting of Mrs. Henman, "Due to illness Mrs. Herman is not taking the polygraph examination. (Signed) Lee Herman."

Mr. Herman's test was made before the plaintiffs had employed counsel to file the instant action. Charles J. Katz, Esq., was employed for that purpose some time after November 11, 1964. The case was filed in the State court on January 25, 1965, and removed to this court on or about February 5, 1965.

At the time Mrs. Herman underwent the polygraph test on April 22, 1965, she was represented at the examination by Attorney Arnold Shane, an associate of Mr. Katz. Mrs. Herman was tested by Mr. Scarce in the presence of Mr. Shane and Mr. White, counsel for the defendant companies.

The evidence is in conflict as to when Mrs. Herman signed the agreement dated April 22, 1965. That agreement was a carbon copy of the November 11, 1964, agreement and was amended by Mr. Shane, or on his suggestion, by omissions and interlineations (See Ex. C). It is noted that all handwriting and the signature of Mr. Herman on the agreement dated November 11, 1964 (Ex. D), as well as Mrs. Herman's signature following the notation as to why she was not taking the test at that time, were written with a pen containing purplish ink wheras the changes in the agreement dated April 22, 1965, (Ex. C) and Mrs. Herman's signature thereon are in blue ink. Mr. Shane, by his supporting affidavit, states he inserted the amendment to paragraph 4 of the stipulation of April 22, 1965 (Ex. C). It appears on close examination of the ink used in the changes that it is the same as that in the signature "Lee Herman". The pen used by Mr. Herman in signing the agreement (Ex. D) on November 11th is obviously the same as used by Mrs. Herman in the writing and signing of the note re her illness on the November 11th agreement. If she had signed the April 22nd agreement on the previous November 11th date, it is reasonable to conclude she would have used the same pen to sign the copy which was used on April 22nd as used in her note and signature thereto made on November 11th. Likewise it is logical to conclude that the amendments and Mrs. Herman's signature on the agreement dated April 22, 1965, were written with the same pen and therefore at the same time. It is obvious that the ink used on the November 11th and April 22nd agreements is not the same.

Mrs. Herman testified that she signed the stipulation dated April 22, 1965, on November 11, 1964. Lapse of

time often dulls memory and it is true that Mrs. Herman did sign the note on the November 11th agreement. It might be easy to confuse the date of her signing the agreement dated April 22, 1965, in the circumstances.

It appears reasonable to conclude from a consideration of all the evidence that the agreement dated April 22, 1965, was signed by Mrs. Herman on that date. Her counsel, Mr. Shane, at that time, did not sign the agreement and stated in a supporting affidavit that he was asked by Attorney White to sign the stipulation but he declined. Mr. White stated in open court and confirmed by affidavit dated September 6, 1966, that Mr. Shane refused to sign the stipulation for the reason he was new in the case but that he would and did permit Mrs. Herman to sign and that she did so sign the stipulation on April 22, 1965.

The question to be determined is whether in the circumstances the polygraph test and the testimony of the examiner re same were properly admitted.

All but one of the many cases examined by the court which concern the use of polygraph tests as evidence were criminal cases.

Referring first to California authorities, the only case wherein a polygraph and testimony of the examiner were held to have been admitted properly is People vs. Houser, 85 Cal. App. 2d 686, 193 Pac. 2d 937, 940 and 942. That case involved prosecution of the defendant for lewd and lascivious conduct. One of the grounds urged on appeal was error in the admission of the results of a polygraph test. A *written stipulation* had been signed by the prosecutor, the defendant and his counsel, authorizing receipt of the results of the

test in evidence and stating that the operator was an expert in interpreting the results of the test. After reciting the stipulation the appellate court observed:

> "It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth * * *." (Page 492)

Counsel for plaintiffs urge that this language suggests that the defendant first raised the objection on appeal. It is true the opinion is not clear in this regard but if the point was being first raised on appeal it appears more likely that the appellate court would have summarily disposed of the point on that ground rather than discussing the testimony re the polygraph and the terms and effect of the stipulation.

Stone vs. Earp (Mich. 1951), 50 No. West. 2d 172, 174, is the only *civil case,* which has been cited or research discloses, wherein the question here involved is discussed. During the course, of the trial in that suit the judge stated he was not going to decide the case until both parties took a lie detector test. The parties thereupon agreed that each should take the test and the examiner be allowed to testify as to the results. The Supreme Court of Michigan held it was error to admit in evidence the results of the tests, which were favorable to the defendant and unfavorable to the plaintiff, but that such evidence was not prejudicial in the

circumstances. At page 174 of its opinion the court says:

> "We are not unmindful of the fact that at the direction of the trial court, the parties agreed to submit to the tests, but whether by voluntary agreement, court direction, or coercion, the results of such tests do not attain the statute of competent evidence."

It appears to this court that the Stone case is to be distinguished from the case at bar by reason of the fact the tests in the Stone case were at the direction of the trial court and not pursuant to an agreement of the nature involved in the case at bar. At best, the comment of the court re a voluntary agreement not making the results of such tests competent evidence is dictum and no authorities are cited in support thereof. In *Colbert vs. Commonweath* (Ky. 1957), 306 So. West. 2d 825, the defendant appealed from a judgment of conviction of armed robbery. The court held that it was error to admit a lie detector test of the defendant. The defendant in the trial court requested permission to take the test and "agreed to be bound by the results." In holding the test inadmissible, the appellate court stated at page 827 of its opinion:

> "Only one recorded case has come to our attention in which results of a lie detector test were held admissible on the basis of a stipulation. In that case, People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937, the defendant not only stipulated in writing that the results of the test could be admitted in evidence, but also that the operator of the lie detector was a qualified expert. We do not consider the instant case to fall in that category.

> Here there was no written stipulation, but only an oral agreement to take the test and be bound by the results, which agreement was not entered of record at the time it was made. We think more formality should be required to give effect to an agreement of such importance. Furthermore, there is no contention that the agreement stipulated the qualifications of the person who gave the test. Accordingly, we do not approach the case as one involving a stipulation of full admissibility."

It is reasonable to conclude that the Kentucky court would have held a polygraph test taken pursuant to the agreement in the Houser case to be admissible.

The Supreme Court of Iowa, in *State vs. McNamara* (Iowa, 1960), 104 No. West. 2d 568, held that a lie detector test was admissible in evidence by reason of the agreement between the parties. The stipulation had been signed by the defendant and witnessed by her attorney and a deputy sheriff. Defendant's counsel, at the trial, objected to any evidence regarding the tests on the grounds they were unreliable and prejudicial. In affirming the conviction for second degree murder, the court observed, at page 574 of its opinion:

> "In the case at bar the defendant expressly agreed and stipulated that the evidence of Professor Holcomb as to the polygraph tests might be received. Exhibit 39 was denominated a 'Release' but it was more than that. She agreed and stipulated that 'said examiner may testify in a Court of Law as to his opinion as to the results of said examination.' The release was signed only after negotiations between defendant's counsel and the county attorney, and after the above quoted

portion thereof was typed as an addition to the printed form. In view of her agreement made with the approval of her able attorney she should not now be permitted to retract her agreement because the test proved unfavorable to her."

The McNamara case is re-affirmed by the Iowa court in *State vs. Freeland* (Iowa 1964) 125 No. West. 2d 829. In the case at bar counsel for Mrs. Herman was fully aware, at least by April 22, 1965, of the terms of the agreement re the polygraph examination. Mr. Shane read the agreement on April 22, 1965, and Mr. Katz states in his affidavit in support of the motion for new trial that Mr. Shane advised him of the terms of the agreement when he (Shane) returned to the office on April 22nd.

Plaintiffs, nor their counsel, at any time prior to trial took the position that the stipulation was not valid because it was not signed by plaintiffs' attorney. On April 23, 1965, plaintiffs' counsel filed their contentions of fact and law and on May 20, 1965, a comprehensive memorandum of law. In neither of these documents was any mention made of the claimed illegality of the stipulation for the taking or use in evidence of the polygraph and the testimony of the examiner or that Mrs. Herman was not bound by the agreement or any part thereof. No contention was made that the agreement was entered into by mistake or because of misrepresentation or that plaintiff should be relieved from same.

Present counsel came into the case on April 1, 1966. They now urge that by the terms of the Pre-Trial Order (page 7, lines 5 to 8, and lines 13 and 14), pre-

pared by Mr. Katz, plaintiffs reserved the right to object to the polygraphs and transcriptions of recordings resulting from the examination, and so forth, of both plaintiffs. Plaintiffs were allowed to object to the offer of said evidence but the objection was overruled on the basis of the authorities referred to herein.

Mr. Shane filed an affidavit re the signing of the stipulation by Mrs. Herman but did not testify in that regard. Mr. Katz was not called as a witness and it appears from his affidavit in support of the motion for a new trial that all he knew about the signing of the stipulation by Mrs. Herman was what his clients had told him.

Although there has been much discussion as to the date Mrs. Herman signed the stipulation, the court concludes that the answer to the question involved is not determined solely by whether Mrs. Herman signed the stipulation on November 11th or April 22nd.

The Supreme Court of New Mexico in *State vs. Tremble* (1961), 362 P.2d 788, 789, cited by plaintiffs, held that the trial court had erred in admitting in evidence the results of a lie detector test although the admission was by reason of a waiver signed by the defendant agreeing to be bound by the results of the test. At page 789, the appellate court observed:

> "We think the court was led into error. The signing of a waiver did not alter the rule with regard to Hathaway's evidence." Citing Colbert vs. Commonwealth, supra, and LeFevre vs. State (Wisc. 1943), 8 No. West. 2d 288.

In *LaFevre vs. State,* the defendant, in a murder case, submitted to a series of lie detector tests under a

stipulation with the District Attorney which provided that the results might be admitted in evidence. The results of the tests were favorable to the defendant but excluded by the court on objection of the State. The Supreme Court of Wisconsin held the exclusion proper in the circumstances, but the court gave no reason or authority for so holding other than *State vs. Bohner* (Wisc.), 246 No. West. 314, a case in which no stipulation was involved. It is also to be noted in the LeFevre case that the *District Attorney had testified that the tests were favorable to the defendant.* At page 293, the court said:

> "We have the word of the district attorney that those tests were favorable to the defendant. While the findings of these experts were properly excluded from the jury, the district attorney's testimony came in without objection and we regard it as very significant."

The results of the tests were, therefore before the court, and the court, on appeal, held that the defendant's conviction was not supported by the evidence and the defendant was forthwith released from custody.

Counsel for plaintiffs also relies on *State vs. Lowry* (Kan. 1947) 185 P. 2d 147. In that case the agreement was only to the taking of the test, not that the results could be used in evidence. The court observed, at page 151 of its opinion:

> "* * * it must be remembered that we are not here considering a case where there was a prior agreement that the results of the test might be admitted in evidence * * *."

The court, in the Lowry case, also discusses and quotes at length from law review articles in the Wisconsin

Law Review and others, all of which distinguish cases wherein a stipulation for use of the test is involved from those where no such an agreement was entered into.

The Lowry case, supra, and others referred to herein, was cited in *People vs. Wochnick* (1950) 98 Cal. App. 2d 124, 219 P. 2d 70, relied on by plaintiffs, but no stipulation for the use of the test was there involved and the general rule was applied which is based on the proposition that the lie detector has not "* * * attained such scientific and psychological accuracy, nor its operators such sureness of the interpretation of figures on a dial that the testimony here in question was competent, over objection, for submission to a jury holding the fate of the defendant in its hands * * *." This quotation from the Lowry case appears at pages 127 and 128 of the opinion in Wochnick, supra.

Plaintiffs also rely on *People vs. Zazzetta* (Ill. 1963), 189 No. East. 2d, 260, wherein the Illinois court ruled that the polygraph test and results were not admissible because (a) the stipulation was "oral", (b) the defendant was a man with an eighth grade education who appeared without counsel at all times prior to trial, including the time the oral stipulation was made, (c) no evidence was introduced regarding the method of testing or the qualifications of the operator, and (d) the examiner was not available for cross-examination.

In the recent case of *State vs. Valdez* (Ariz. 1962), 371 P. 2d 894, the Supreme Court of Arizona treated at length the question of the admissibility in evidence of a polygraph test and the expert testimony relating thereto in the circumstances there involved. The test

had been made pursuant to a stipulation, between the County Attorney, the defendant and his counsel, which provided that the results of the test were admissible in evidence at the trial. The polygraph operator was permitted to testify to the results of the examination over the objection of defendant's counsel. The jury returned a verdict of guilty and the question of the proprietary of the admission of the results of the test in the circumstances was certified to the Supreme court of Arizona.

This being a matter of first impression in Arizona, the court reviewed many opinions of text writers, law review articles and authorities on the subject, including all of the cases cited and discussed herein except the Zazzetta case, decided after Valdez.

In commenting on the LeFevre case, supra, the Court pointed out that the District Attorney objected to the "reports by themselves" of the polygraph examination and "only on the ground" that the examiners were not present and should have been called to testify as to the results (page 898, 899). At page 899 the court comments on the holdings in several of the cases cited herein as follows:

> "In addition to the express holdings in Houser and McNamara admissibility of lie-detector evidence upon stipulation has been indicated by implication in the following cases: State v. Arnwine, 67 N.J. Super. 483, 498, 171 A.2d 124, 132 (1961); Colbert v. Commonwealth, 306 S.W. 2d 825, 71 A.L.R. 2d 442 (Ky. 1957); Commonwealth v. McKinley, 181 Pa. Super, 610, 123 A.2d 735 (1956); State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947). For a discussion of unreported

> trial cases in which lie-detector results were admitted per stipulation see 1943 Wis. L. Rev. at 435; 26 J. Crim. L. & C. 262 (1935-36)."

The Arizona court, after discussing the cases pro and con re the admissibility of the results of polygraph tests, concludes that where the parties have stipulated to the admissibility of the evidence in Arizona criminal cases the evidence is admissible (subject to certain qualifications stated) to corroborate other evidence of a defendant's participation in the crime charged and if he takes the stand such evidence is admissible to corroborate or impeach his own testimony.

At page 900 of the opinion, the court commented on the perfection of the lie detector test and the probative value thereof as follows:

> "With improvement in and standardization of instrumentation, technique and examiner qualifications the margin of proven error is certain to shrink. 'Modern court procedure must embrace recognized modern conditions of mechanics, psychology, sociology, medicine, or other sciences, philosophy, and history. The failure to do so will only serve to question the ability of courts to efficiently administer justice.' Chappell, J., concurring in Boeche v. State, 151 Neb. 368, 383, 37 N.W. 2d 593, 596, 600 (1949). Although much remains to be done to perfect the lie-detector as a means of determining credibility we think it has been developed to a state in which its results are probative enough to warrant admissibility upon stipulation. Cf., People v. Zavaleta, 183 Cal. App. 2d 422, 6 Cal. Rptr. 166, 171 (1960)."

The *Zavaleta* case, 6 Cal. Rptr. 166, cited above, holds, in pertinent part:

> "It has long been established that counsel may stipulate to evidence which may be received (People v. Mathews, 163 Cal. App. 2d 795, 329 P. 2d 983) even though it might be inadmissible (People v. Ah Ton, 53 Cal. 741), * * * In the absence of any claim that the stipulation was entered into by mistake, inadvertence, fraud or misrepresentation and that defendant should be relieved of the same, we find no merit to objection raised at this time." (Page 171).

In the case at bar neither Mrs. Herman nor her counsel were uninformed as to the nature of polygraph tests, as Mrs. Herman had undergone such a test administered by her own polygraph expert, Mr. Russell James, in March, 1965, more than one month prior to her examination on April 22nd. Whether the stipulation was signed by Mrs. Herman on April 22, 1965, or November 11, 1964, does not appear to the court to be determinative of the matter. Her counsel was present before and during the examination, made changes in the stipulation and made no objection to Mrs. Herman taking the test. He knew the terms under which the test was being given and no objection was made as to the provision in the stipulation for use of the test in evidence or the manner in which it was taken. Although plaintiffs reserved the right to object to the polygraph test and transcriptions of the recordings in the Pre-Trial Order filed May 10, 1965, no mention was made of any contention of law in plaintiffs' memorandum of law filed May 20, 1965, that the tests, or either of them, would not be admissible in evidence although the provi-

sions of the stipulation re admissibility into evidence of the tests were known to plaintiffs and their counsel at least since April 22, 1965, and this is true though a copy of the stipulation signed by Mrs. Herman was not sent to plaintiffs' counsel by Mr. White until December, 1965. It is also to be noted that no relief was sought from the stipulation at any time before trial.

There is little doubt but that plaintiffs would have relied on the stipulation if the polygraph tests had resulted favorable to plaintiffs' position. Having in mind all of the facts and circumstances in the case and the pertinent authorities, the court concludes that, by reason of the stipulation, Exhibit C, the testimony of Mr. Kenneth Scarce re his examination and his opinion based upon said examination together with the polygraph, plaintiffs' Exhibit 7, and the transcript of the examination, defendants' Exhibit F, were properly admitted into evidence.

For the reasons stated above, the plaintiffs' motion for new trial is denied.

Dated: September 28, 1966.

E. Avery Crary
United States District Judge